FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 12 1947

No. 258

In the Supreme Court of the United States

OCTOBER TERM, 1947

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES M. SCHWABACHER, ET AL.,
APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION OF THE UNITED STATES TO AFFIRM

MOTION TO AFFIRM

(Filed August 7, 1947)

(Title of Court and Style of Case Omitted.)

Appellees United States of America and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from a final decree entered June 16, 1947[1] by a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a complaint to set aside an order of the Interstate Commerce Commission dated April 1, 1947.[2] Appeal was allowed on July 22, 1947. Copies of the appeal papers were served on the United States and Interstate Commerce Commission on July 23, 1947.

The Commission's order sought to be enjoined by this appeal approved and authorized the merger of the properties and franchises of the Pere

[1] The District Court also rendered an opinion (as yet unreported) on June 12, 1947. Both the final decree and the opinion are appended to Plaintiffs-Appellants' Jurisdictional Statement filed herein.

[2] The Commission's Order and Report, entered in a proceeding entitled Pere Marquette Railway Co. Merger, etc., Finance Docket No. 15228, are appended to Plaintiffs-Appellants' Complaint as Exhibit 1-A.

Marquette Railway Company and the Chesapeake and Ohio Railway Company pursuant to the terms of the Interstate Commerce Act, as amended.[3]

Plaintiffs-Appellants are the owners of 2,100 shares of 5 percent cumulative preferred stock of the Pere Marquette Railway.[4] They intervened in the proceeding before the Commission in opposition to the proposed merger upon the ground that the merger agreement was unfair because it failed to protect their rights and interests as dissenting shareholders, based principally upon a claim to accumulated unpaid dividends. They urged that failure by the Commission to determine their rights apart from the assenting stockholders of the same class was a failure to perform its statutory duty. Plaintiffs-Appellants' complaint confined its attack on the Commission's order to this issue. No claim was made that the findings made in the Commission's report were unsupported by substantial evidence, and the transcript of evidence adduced before the Commission was not introduced in evidence before the District Court.[5]

---

[3] The merger was consummated on June 6, 1947, after a motion for a temporary stay of the Commission's Order had been denied by the District Court on June 4, 1947.

[4] This represented 2 percent of the total outstanding stock of this class.

[5] It is settled law that the findings of fact as stated by the Commission in its report must be accepted by the courts in the absence of the entire record of evidence upon which they

The Commission reached the conclusion that "the terms and conditions proposed by the applicant (i. e., the railroads) are just and reasonable", and that "having reached that conclusion, performance of our duty in respect to stockholders is complete, in our opinion, when we make certain that all stockholders of the same class are to be treated alike" (Exhibit 1 (a), p. 32). The Commission went on to say that "Whether dissenting stockholders, as members of a class created by the merger are entitled to better treatment under their charter contract with Pere Marquette is a question not within our province to decide" (ibid). The Commission expressly stated that its holding did not preclude the dissenting stockholders from settling their controversy with the railroads "through negotiation and litigation in the courts" (ibid).

The principal contention made by the appellants is based upon the provisions of the Interstate Commerce Act giving the Commission "exclusive and plenary" authority to approve mergers (section 5) and the assumption of liabilities with respect thereto (section 20 (a)),* on

---

were predicated. *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286; *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, 122, 125; *Louisville & Nashville R. Co.* v. *United States*, 245 U. S. 463, 466; *Louisiana & P. B. Ry. Co.* v. *United States*, 257 U. S. 114, 116; *Tagg Bros.* v. *United States*, 280 U. S. 420, 443.

*The full text of sections 5 (11) and 20 (a) (7) is as follows:

SECTION 5 (11): "The authority conferred by this section shall be exclusive and plenary, and any carrier or corpora-

"such terms and conditions and such modifications as it [the Commission] shall find to be just and reasonable" (section 5 (2) (b)). The

tion participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

SECTION 20 (a) (7): "The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

appellants argue that these provisions of the statute prohibit the Commission from remitting the determination of claims of dissenting stockholders against the corporation to other tribunals empowered to deal with them.

We submit that this contention, which was urged upon and rejected by both the Commission and the district court, is without merit. It seems clear that the Commission can properly decline to arbitrate or adjudicate private disputes between dissenting stockholders or between the former and the corporation, where in the judgment of the Commission no considerations of national transportation policy are involved. The statutory criteria which the Commission must consider in passing upon applications by railroads for authority to merge their properties and franchises are contained in section 5 (2) (b) and (c) of the Interstate Commerce Act, 49 U. S. C. section 1, *et seq*:

> (b) * * * If the Commission finds that subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable. * * *.
>
> (c) In passing upon any proposed trans-

> action, under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

The "exclusive and plenary" jurisdiction of the Commission would seem to extend only to the determination of issues involving transportation factors relevant in passing upon proposed mergers. Where the Commission finds that an issue does not involve any such considerations, the statute hardly imposes an inexorable obligation upon the Commission itself to settle such issue.

As stated by Judge Dobie, who delivered the opinion in the district court, the issue which the Commission was called upon to decide was as follows:

> Reduced to its lowest terms, the case of the plaintiffs here seems to be based on the theory that dissenting stockholders (quite apart from any merit in the grounds of dissent) are entitled to preferential treatment more favorable than the treatment accorded to stockholders of the same class (holding the same securities) who did not

> dissent but agreed to the terms of the merger agreement; and, as a consequence, if the Commission does not grant such preferential treatment to the dissenting stockholders, a three-judge district court is justified in setting aside or modifying the order of the Commission.

It is submitted that the Commission discharged its statutory obligations in dealing with the claims presented to it by the appellants. With particular reference to its finding that the terms and conditions proposed were just and reasonable, it carefully analyzed the proposed exchange ratio of Chesapeake & Ohio securities which were to supplant securities of the Pere Marquette. Various bases of value were set up to measure the fairness of the proposed treatment of stockholders in both railroads. As to this the Commission concluded (Exhibit 1A, p. 31):

> Accordingly, considering Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stock, all as set forth above, we find that, as to the stockholders of both parties generally, the proposed ratios of exchange, stock issues, and assumptions of indebtedness are just and reasonable.

The Commission further found:

> * * * performance of our duty in respect to stockholders is complete, in our

> opinion, when we make certain that all stockholders of the same class are to be treated alike.

Thus the Commission undertook to prevent any discrimination against non-assenting minorities. In short, the Commission found that all holders of Pere Marquette preferred stock were a single class for purposes of the Commission's obligation to require "just and reasonable" terms as a condition to its approval of the merger. It further concluded that if dissenting stockholders had individual contractual rights which might be asserted under state law, that was a matter not within the Commission's province to decide. The district court approved this view. It stated:

> As we read the opinion of the Commission it did not attempt to pass upon what rights, if any, dissenting stockholders might have under the laws of the several states. It specifically left Pere Marquette and Chesapeake and Ohio "free to settle controversies with dissenting stockholders through negotiation and litigation in the courts." We adopt a like course.

Contrary to appellants' assertion in their Jurisdiction Statement (p. 11), there is no Commission decision of which we have knowledge which provides for separate treatment for dissenting shareholders as a separate class by attaching conditions to its approval of merger applications.

Here the Commission fully discharged its statutory obligations in approving the merger agree-

ment and property left Pere Marquette and Chesapeake & Ohio "free to settle controversies with dissenting stockholders through negotiation and litigation in the courts".

For the foregoing reasons, it is respectfully submitted that no substantial question is presented by this appeal, and that the judgment of the District Court should be affirmed.

(Sgd.) Philip B. Perlman,
PHILIP B. PERLMAN (V. B.)
Solicitor General.

(Sgd.) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

AUGUST 7, 1947

I certify that a copy of the foregoing motion to affirm was served on counsel for all parties of record by mail this 7th day of August, 1947.

(Sgd.) Edward J. Hickey, Jr.,
EDWARD J. HICKEY, Jr.,
Special Assistant to the Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1947